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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ANNA L. BROWN,

Petitioner,

v.

THE FLORIDA BAR, THE SUPREME COURT OF FLORIDA, R. FRED LEWIS, CHARLES T. WELLS, HARRY LEE ANSTEAD, BARBARA J. PARIENTE, PEGGY A. QUINCE, RAOUL G. CANTERO, AND KENNETH B. BELL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit affirmed the district court's dismissal with prejudice of Anna Brown's petition for declaratory judgment concerning her constitutional rights as a coerced member of Florida's integrated state bar, and other issues relating to her affiliation with the state bar.

The lower courts held, in essence, that any lawyer's coerced association with any integrated bar *per se* is an issue that this Court has conclusively decided as to any issue or circumstance. Ms. Brown contends that such a sweeping, *per se* ruling is not extant as applying to every integrated bar, every attorney forced to join such bars, or every circumstance.

Five questions are presented:

1. Does the U.S. Constitution permit Florida to deny Ms. Brown her fundamental freedom of association by coercing her membership in its integrated bar as a precondition to her employment as an attorney, in and of itself.

2. Do the First or Fourteenth Amendments prohibit Florida from enforcing Ms. Brown's compelled association with its integrated bar when there are less restrictive means to accomplish whatever compelling state interests animated the integration of the state bar?

3. Is the integrated bar sufficiently akin to a labor organization so as to support Ms. Brown's fundamental right not to associate with it, under this Court's line of cases governing labor organizations and non-consenting affiliates?

4. Is the Eleventh Circuit's case precedent, *Kaimowitz v. Florida Bar*, 996 F.2d 1151 (11th Cir. 1993) (granting Eleventh Amendment immunity), good law considering the first three questions, and under the subsequent holding of *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994) (construing Eleventh Amendment immunity)?

5. Should a federal court determine whether there is a rational basis for the disparity that exists between how Florida regulates lawyers as an unprotected class and how Florida regulates all other licensed professionals, per the law governing 42 U.S.C. § 1983?

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The Orders and Opinions of the Middle District of Florida are reprinted in the Appendix to the Petition ("Pet. App.") at Pages 3a–39a. The Eleventh Circuit's Order affirming dismissal is reprinted at Pet. App. 1a–2a

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eleventh Circuit's opinion was rendered and became final on December 27, 2010.

CONSTITUTIONAL / STATUTORY PROVISIONS INVOLVED

U.S. Constitution, First Amendment

U.S. Constitution, Fourteenth Amendment

Title 42, United States Code, Section 1983:

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except

> that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Anna Brown is a licensed Florida attorney and has been a member of the Florida Bar since 1995. The Florida Bar ("Bar") is an integrated state bar, meaning that Brown's membership is involuntary. Unless Brown is and remains a member in good standing, she cannot practice law in the state. Her standing can be adversely affected by her own action (non-payment of dues) or by the regulatory apparatus that is operated by the Florida Bar and supervised by the Supreme Court of Florida ("state court").

Brown objects to her compelled membership in the integrated bar under the First and Fourteenth Amendments to the U.S. Constitution. The First Amendment guarantees her a fundamental, negative freedom of association, that is, the right not to associate. She contends that the system of regulation to which she is subject, operated by the Florida Bar as that is "integrated" with the Florida Supreme Court, violates her right of equal protection provided by the Fourteenth Amendment, as regards her liberty, property and due process interests.

In 2004, the Florida Bar filed a disciplinary case against Brown, the gravamen of which centered on an alleged conflict of interest in representing two clients. She had no prior disciplinary record. Brown moved to dismiss for failure to state a cause of action regarding the alleged conflict, and the judge agreed, dismissing the major portion of the Bar's case with prejudice. Her case went to trial in 2005 on lesser allegations. She was found guilty of violating certain rules (not pertinent here), upon which the judge recommended that she be given the lowest formal discipline, an admonishment. After trial the Florida Bar appealed the dismissal, and the state court reversed and remanded to determine whether Brown had represented two clients whose interests were directly adverse.

Upon remand, the judge entered a directed verdict for Brown, and against the Florida Bar. Again the Bar appealed. This time, the state court not only reversed, but made its own factual findings. It held that the interests of Brown's clients were in fact directly adverse and that Brown was therefore guilty of violating the conflict of interest rule, and it ordered her license suspended for 90 days – the maximum allowable non-rehabilitative (read: automatic reinstatement) suspension permitted under the rules. The order of suspension also explicitly stated that: THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION. (Capitals in original.) In the reported case that language is removed. *See Florida Bar v. Brown*, 978 So.2d 107 (Fla. 2008). Nonetheless, Brown timely filed a motion for rehearing.[1]

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1. As to her due process claims, Brown noted that the state court had violated its own case law and rules by extirpating her

Brown sued in the Middle District of Florida in March 2008, seeking declaratory and injunctive relief regarding the aforesaid issues. She later amended the pleading. The gravamen of her Amended Complaint was that: a) Florida's system of lawyer regulation is separate and unequal compared with its system of regulating all other licensed professionals by virtue of the integration of the Bar with the state court; b) that this segregated regulatory scheme fails to provide equal protection in that it affords Brown (and all Florida lawyers) lesser due process rights than are afforded all other licensed professionals; c) that this inequality impaired her liberty and property interests as well; and d) that the lack of participation by the legislature and executive branch in the regulatory process, coupled with the "marriage" of the Bar to the state court, precluded any meaningful right of appeal to an independent tribunal (as other professionals enjoyed), and fostered favoritism toward the Bar.

In her equal protection claim Brown alleged that Florida lawyers lack procedural and substantive due process safeguards that are granted to other Florida professionals, and that without a rational basis Florida's disciplinary process subjects lawyers to the caprice of their fellow (coerced) members with no system of checks and balances, which tends to result in abuse and a concentration of power in the association's elites. Brown alleged that other Florida licensed professionals are not subjected to such practices and processes.

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right to a stay of the suspension order while she sought rehearing. *See* Fla. R. App. Proc. 9.020 (2008) (an order is not deemed rendered until disposition of a motion for rehearing); *cf. Wagner v. Bieley, Wagner & Assoc., Inc.*, 263 So.2d 1 (Fla. 1972) (a motion for rehearing suspends the rendition of a judgment or decree during the pendency of the motion).

Brown sought relief as to her rights of due process and a declaration as to the Florida Bar's Eleventh Amendment immunity. Further, she sought declaration on the federal question as to whether her involuntary membership violated the First Amendment, and whether the Bar was tantamount to a labor organization, such that her coerced membership in it amounted to an impermissible precondition to her employment as a lawyer in Florida under the state's "right to work" clause.

The district court dismissed with prejudice several of Brown's counts in her Amended Complaint and the remainder were dismissed without prejudice. Appx. C. Brown filed a two-count Second Amended Complaint, also seeking declaratory and injunctive relief. The gravamen of this pleading was that her involuntary membership in the Florida Bar violated a fundamental First Amendment right, her negative freedom of association, and violated Florida's state ban on forced membership in a labor organization as a precondition to pursuing her chosen livelihood. The two counts sought declarative, and then injunctive, relief as to this basic issue. The district court dismissed with prejudice her Second Amended Complaint. Appx. B. The court held that Ms. Brown's petition sufficiently set forth an actual controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201 – indeed, deeming it a "substantial dispute, with no middle position available." Appx. B at 11a. However, the court declined to exercise its supplemental jurisdiction with respect to whether Ms. Brown's coerced membership in Florida's integrated bar as a precondition to her employment as an attorney violated Florida's constitutional "right to work" clause. Appx. B at 17a.

Brown appealed all issues, and filed a Petition for En Banc Review regarding the interpretation or continued vitality of cases on which the district court had relied, namely, *Kaimowitz v. Florida Bar*, 996 F.2d 1151 (11th Cir. 1993), and *Lathrop v. Donohue*, 367 U.S. 820 (1961). She argued that *Kaimowitz*, which includes an uncritical grant of Eleventh Amendment immunity to the Florida Bar, must be reviewed in light of this Court's intervening authority, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). Brown also challenged *Kaimowitz* for its broad assertion regarding the limited holding and meaning of this Court's plurality opinion in *Lathrop* (regarding the extent of its holding with regard to compelled membership).

The Eleventh Circuit's jurisprudence (through *Kaimowitz*) essentially holds that the constitutionality of involuntary membership in the Florida Bar is an issue that has been decided as to every instance or circumstance; therefore, it applies to Brown's case. Accordingly, the Eleventh Circuit affirmed as to all issues, based on those two cases (*Kaimowitz* and *Lathrop*). See Appx. A. This Petition followed.[2]

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2. Brown requested the district judge to recuse based on his longstanding, voluntary membership in the defendant, Florida Bar, which, she argued, conflicted with her involuntary membership because she was asking him to rule on the constitutionality of her compelled membership; however, the judge refused. Brown's case on appeal was decided by a three-judge panel, two of whom had been (and remain) members of the Florida Bar for a total of over 70 years, and one of whom (Justice Barkett) served on the Florida Supreme Court. Although Brown made the denial of recusal part of her appeal, the circuit court's disposition does not mention that issue. No disrespect or implication is intended by this note.

REASONS FOR GRANTING THE PETITION

Brown's right of freedom of association is a fundamental right. Although the right is not expressly set forth in the Bill of Rights, the Court has held that a freedom of association is encompassed by the First Amendment and is a fundamental right protected by it. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Government limitation on this individual right is subject to strict scrutiny. *Id.* at 461. The Court has recognized that the right of freedom of association includes a negative aspect – the right not to associate. That is, Brown cannot be compelled to support or join an organization when she disapproves of the ideology or political goal that the group promotes or supports. *See Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977).

The individual rights guaranteed in the first eight Amendments in the Bill of Rights are deemed fundamental. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Any government practice that restricts fundamental rights is subject to strict scrutiny and can be justified only if it furthers a compelling government purpose and even then only if no less restrictive alternative is available. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, J., concurring in the judgment and dissenting in part). *See also Troxel v. Granville*, 530 U.S. 57, 80 (2000) (strict scrutiny is the appropriate standard for infringements of fundamental rights) (Thomas, J., concurring in the judgment).

Brown objects to the nature of the Florida Bar as a political organization created by the state to hold and use political power subject to the state court's political

power. In this respect her position is no different from a schoolteacher who is philosophically opposed to compelled membership in a labor organization. Brown believes that while she can be required to pay money to support the Bar, in part, she cannot be forced to be a member of it against her will, and that the pertinent case law supports her position.

I. REVERSAL AND REMAND WILL CLARIFY A FUNDAMENTAL RIGHT IN CONTEXT WITH FLORIDA'S COMPETING INTEREST.

A. Florida cannot violate Brown's negative freedom of association because it has a less restrictive means of regulating lawyers.

Brown concedes that Florida has some right to impair her freedom of association. Before it can rightly interfere, however, Florida must show two things: 1) That the governmental interest being pursued is a compelling one; and 2) That the interest the government is promoting cannot be achieved by the least restrictive means. *See Chicago Teachers Union v. Hudson*, 475 U.S. 292 , 311 n.11 (1986). In the regulation of lawyers, Florida does have available less restrictive means, as explained *infra*.

To Brown's knowledge, integrated state bars have been the subject of this Court's decisions with respect to the First Amendment's negative freedom of association on only two occasions. The first was *Lathrop v. Donohue*, 367 U.S. 820 (1961) (plurality opinion); the other was *Keller v. State Bar of California*, 496 U.S. 1 (1990), a unanimous opinion. In both cases the court ruled on a very limited First Amendment issue: the coerced association of lawyers

for the sole purpose of paying compulsory dues to support the integrated bar (in *Keller*, the issue focused on the limits of such compelled payments).

The *Keller* Court noted that an integrated bar is much more closely analogous to a labor organization than it is to a state agency.[3] Because an integrated bar is a creation of the state, and it seeks to influence government policymaking as part of its reason for being, it is more akin to a public-sector union than to a private labor organization. There is little doubt that Brown has a First Amendment right against being made to join, or remain a member of, such an organization; the essential thrust of *Keller* is that the court's earlier decision *in Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977) applies to the operations of an integrated state bar, and *Abood* is among a line of this Court's cases supporting the negative freedom of association.[4]

In *Ellis v. Brotherhood of Rwy. Employees*, 466 U.S. 435 (1984), the Court followed *Abood* and held that (under the Railway Act) a labor organization cannot spend compelled dues for any purpose beyond its original purpose, that is, collective bargaining. More pertinently,

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3. "There is, by contrast, a substantial analogy between the relationship of the State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Keller*, 496 U.S. at 12.

4. Left unstated in *Keller* (and perhaps why the Court declined to visit the broader issue of negative freedom of association therein) is that *Abood* supports the notion Brown espouses here: While the state may require her to financially support a state bar association as an incident of her licensing, it cannot force her to affiliate with what is essentially a political entity.

the Court also held that the organization "cannot be allowed to commit dissenters' funds to improper uses – even temporarily." *Id.* at 443-444. In other words, a labor organization (and by extension an integrated bar) cannot take involuntary loans from dissenting members, and then offer some time later to rebate a portion back.

In *Gibson v. Florida Bar,* 798 F.2d 1564 (11th Cir. (1986), the Eleventh circuit held that coerced members of the integrated bar cannot be made to fund legislative lobbying efforts or other activities that fell beyond the organization's original purpose. *Gibson*, however, implies that the "least restrictive means" to remedy the limitation on political speech is to rebate a portion of dues. *See id.* at 1569. *Gibson*, as did *Keller* later, relied heavily on *Abood* for its analysis between labor organizations and integrated bars.

Under this Court's line of cases, however, it seems improper to permit the rebate remedy that *Gibson* suggests, since it permits an integrated bar to exact involuntary loans from dissenting members, whereas that is disallowed in the context of labor organizations. In *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), the Court ruled that workers covered by the National Labor Relations Act can prospectively withhold compelled dues from a labor organization for everything but the actual cost of its original purpose, collective bargaining. The ruling affirmed and extended the Court's rationale and holding in *Ellis.* Taken together, *Abood, Beck, Ellis, Gibson* and *Keller,* remove all distinctions between individual rights in the private and public sector relating to coerced payments and their relation to the original purpose of the organization, including integrated state bars.

In *Pattern Makers v. National Labor Relations Board*, 473 U.S. 95 (1985), the Court affirmed an individual's unqualified right to immediately resign his or her membership in a labor organization. *Cf. Chicago Teachers Union v. Hudson.* 475 U.S. 292, 309-310 (1986) (finding that teachers' due process and First Amendment rights had been violated and holding that the labor organization must provide the teachers with information supporting the entity's financial breakdown of forced dues, as verified by independent audit). Brown contends that she should have no less right, under the line of cases discussed here, to quit her compelled membership while having the State of Florida verify the reduced annual dues she must pay, which currently fund a plethora of functions unrelated to the original purpose animating the integration of the state bar. This would require reversal and remand to a trial court to determine, for example, the original purpose animating the integration of Florida's bar, and the portion of annual dues that Florida attorneys pay to fund all the Bar's functions as opposed to those funds necessary to its original purpose.

The state court first ruled on a petition for integration filed by the voluntary state bar association in 1938, but in an extensively researched opinion it held that granting the petition would violate the separation of powers. *See Petition of Florida State Bar Ass'n,* 134 Fla. 851, 186 So. 280 (Fla. 1938). In 1944, Florida adopted its "right to work" clause into its constitution. Then in 1949, the voluntary bar filed another petition for integration, this time including the results of its own "poll" showing that 42% of the then-total number of Florida lawyers agreed with integration. This time, the state court used its inherent power to integrate Florida's bar, relying on the

petitioner's poll. *See Petition of Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949). In dissent, Justice Barns made this pithy observation:

> "This Court is without power to compel the members of the bar to become members of a pseudo-organization called the integrated bar, and it is ill-becoming for this Court to do anything that would tend to coerce such membership. For this Court to compel or coerce membership of the attorneys in an 'integrated bar' association and to prescribe dues to be paid by the members simply means that this Court is attempting to levy a tax, and the judiciary cannot lawfully levy a tax, by whatever name it may be called."[5]

The political movement seeking "integration" of state bar associations began in earnest in the United States during the 1920s. *See* Leon Goodman, *The Virginia Law Register*, N.S., May 1926 at 20. Goodman noted that, as of the date of his article explaining (extolling) bar integration, four States had already enacted legislation integrating their state bars: North Dakota, Idaho, New Mexico, and Alabama. *Id.* at 20. It perhaps is no accident of history that the push to integrate state bars coincided with the rise of labor organizations. The social philosophy of that bygone era espoused the benefits of collectivism in many different areas, social, political, industrial, judicial and otherwise. By 1961, the judicial movement had resulted in the integration of the state bars of 26 states, including

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5. *Petition of Florida State Bar Ass'n*, 40 So. 2d at 909 (Barns, J., dissenting).

Florida. *See Lathrop v. Donohue*, 367 U.S. 820, 848 n. 1 (1961) (Harlan, J., concurring).[6] Although Minnesota was involved in the movement early, that state resisted the push toward integration; today the Minnesota State Bar Association remains voluntary.[7] Currently, 27 states have integrated state bars, four of which have "right-to-work" provisions in their constitutions: Arizona, Florida, Mississippi and Oklahoma.

Because the bar integration movement sought to alter the relationship between private lawyers and state judiciaries, the movement was, by its nature, a political one. The very definition of a "state" is: "The political system of a body of people who are politically organized." Black's Law Dictionary (abrg'd. 7th ed. (Gardner, ed.)) (West Publishing 2000, p.1137). Thus, a state integrating its bar, through whatever means, is an inherently political act resulting in a new political construct. Thus, when Florida integrated its "bar" (that is, its lawyers) it created a new political entity, for political purposes. The state court identifies the Florida Bar as its "official arm." There is hardly a dispute that by and through this "integration," Florida compels Brown to associate with a political organization, the Florida Bar, as a precondition to her

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6. That is: Alabama, Alaska, Arizona, California, Florida, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin Wyoming.

7. Since *Lathrop*, two other states integrated their state bars: New Hampshire (1971) and Montana (1974). California, once integrated, has reverted to a voluntary association. Thus, 23 states have voluntary bars; Arkansas is a hybrid of sorts – a voluntary bar integrated only with respect to disciplinary matters.

being employed as a lawyer regardless of who employs her. The pertinent difference between Florida's (integrated) bar and Minnesota's (voluntary) bar associations is that the former holds and exerts subordinate political power, and the latter does not. Subordinate political power is "power that, within its own sphere of operation, is subject in some degree to external control because there exists some superior constitutional power that can prevent, restrict, direct, or annul its operation." Black's Law Dictionary (abrg'd. 7th ed. (Gardner, ed.)) (West Publishing 2000, p. 945) (under "political power").

Resort should be made to the initiating document to discover the original purpose behind integrating the Florida Bar, for, under the union cases, it is these original purposes animating the creation of a labor organization which inform the courts what an otherwise "free-rider" (a non-consenting worker) can be required to fund, and what ancillary purposes such dissenters may not be compelled to fund. Interestingly, in *Petition of Florida State Bar*, the state court specifically discounted the regulation and disciplining of attorneys as any compelling purpose or reason to integrate the bar. *See* 40 So.2d at 904. Because the state infringes on Brown's fundamental right not to associate with its political construct, and because she demands dissociation by objecting to her coerced political affiliation, according to her conscience, the question really becomes whether Florida has any less restrictive means available to accomplish whatever it is that the Florida Bar does that can rightly be deemed a compelling state interest. Strictly construing the original purposes for integrating the bar will inform as to what the compelling state interests are, and the amount of fees that dissenters must pay to help fund those interests. It will also test

whether the least restrictions on fundamental rights are used to pursue those purposes. For these reasons, Petitioner respectfully requests that the writ be granted, and the case reversed and remanded.

B. The jurisprudence of *Lathrop v. Donohue* relating to the negative freedom of association does not withstand strict scrutiny.

In *Lathrop v. Donohue*, 367 U.S. 820 (1961), Justice Brennan announced the judgment of the Court. Justice Harlan concurred in the judgment, as did Justice Whittaker. Justices Black and Douglas wrote sharp dissents. Exactly what the *Lathrop* court decided is rather confusing.[8] Mr. Lathrop, a lawyer, had sued the state supreme court objecting to his coerced membership in the integrated bar and objecting that his coerced dues supported the political activities of the bar. On the issue of his negative freedom of association, Justice Brennan observed that:

> "[Lathrop's] compulsory enrollment imposes only the duty to pay dues. [ ] The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us. The [state] court said: ' . . . The only compulsion to which he has been subjected by the integration of the bar is the payment of the annual dues of $15 per year.' [ ] We therefore are confronted, as we were in Railway Employees' Department v. Hanson, 351 U.S. 225 [ ], only with a question of

8. The *Keller* Court later emphasized the limited holding of *Lathrop*.

> compelled financial support of group activities, not with involuntary membership in any other aspect."[9]

With due respect, a gaping flaw is evident in the Court's assertion that the lawyer's compelled membership only compels him to pay dues. No, it compels his "membership" (read: association) with a government-created political entity, *ipso facto*, which is an issue separate and distinct from the requirement to pay dues – which distinction this Court's line of union cases clearly makes. Every lawyer everywhere – whether conjoined in an "integrated bar" or otherwise, pays licensing fees to a political entity. Another flaw evident in *Lathrop* is that framing the First Amendment issue in this way begs the obvious question: If the sole requirement of Lathrop's coerced association is merely "to pay dues," then why is his coerced association necessary *at all* – why doesn't the state simply compel the fee?[10]

The broader implications of Lathrop's negative freedom of association never actually made it before the Court because the scope of the issue had been shaped by his opponent, the state bar, as Justice Brennan admitted.

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9. *Lathrop*, 367 U.S. at 827-28 (citations and footnotes omitted) The correct citation to *Hanson* is *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956).

10. If the sole basis for coercing membership in a state-created association is to compel the payment of dues then no rational basis exists for the coerced association, because that funding function is currently accomplished by the 23 states that do not compel membership in an integrated bar. Thus, it cannot be the "least restrictive means," *ipso facto*.

This precluded inquiry into Lathrop's freedom of conscience; his liberty of thought or choice regarding his coerced affiliation with a state-spawned political entity. Short shrift was given to his freedom of association not only due to the narrowed scope of the issue, but also because the Court used a straw man fallacy.[11] Tracing Justice Brennan's argument – as he himself did – to the *Hanson* case, one finds this assertion by Justice White in that union case:

> "On the present record, there is no more an infringement or impairment of [Hanson's] First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar. It is argued that compulsory membership will be used to impair freedom of expression. But that problem is not presented by this record."[12]

Unfortunately, Justice White made that offhand observation regarding integrated bars without reference to, or the benefit of, a single case precedent relating to integrated bars and the First Amendment rights of compulsory members thereof. He seemed to simply assume – with no jurisprudential basis – that the First Amendment posed no disability in coercing attorneys to join a state-created political organization. (In all fairness, practically all of the Court's "freedom of association" jurisprudence post-dates the *Hanson* case.)

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11. In logic the "straw man fallacy" involves stating a false or distorted premise and using that to reach an illegitimate conclusion.

12. *Hanson*, 351 U.S. at 238.

Hanson was a union shop case involving a provision of the federal Railway Act; Hanson claimed that his coerced union membership violated his freedom of association. In comparing Hanson's coerced membership with a lawyer's coerced membership in an integrated bar, Justice White made a classic straw man argument, to wit: **Premise A** (The Straw Man): The integrated bar does not infringe on an individual lawyer's negative freedom of association; **Premise B**: The Railway Act provision is "no more an infringement" of Mr. Hanson's protected right than is a lawyer's coerced membership in an integrated bar; **Conclusion**: Therefore, the Railway Act does not violate Mr. Hanson's negative freedom of association.[13]

Justice White's Premise A is a "straw man" because it implies a tautology: An integrated bar does not infringe on a lawyer's freedom of association because it does not infringe on a lawyer's freedom of association. This discussion demonstrates that the very root of this Court's case law regarding lawyers' negative freedom of association with respect to compelled membership in an integrated bar stems directly from this logical fallacy. The statement by Justice White cannot reasonably be considered as anything other than unsupportable dictum.

As these things sometimes happen though, the dictum grew into *stare decisis*. In his *Lathrop* concurrence,

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13. Actually, the straw man premise was merely implied. Justice White did not aver that an integrated bar does *not* infringe on a lawyer's freedom of association. What he did state – that "there is no *more* an infringement or impairment" – does not actually state a factual assertion. Thus, the analogy fails because there are no factual premises, only conclusions.

Justice Harlan harked back to this straw man fallacy in making this assertion:

> "The *Hanson* case, [ ] surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, [ ]. [ ]. The Integrated Bar was in fact treated as such an *a fortiori* case in the *Hanson* opinion itself."[14]

With respect, this passage is nothing more than one leap of illogic heaped on another. In the span of five years, Justice White's dictum in *Hanson* attained *a fortiori* status. Perhaps it was such circular logic[15] appearing in *Lathrop* that prompted the *Keller* court to reiterate *Lathrop's* limited holding:

> "The *Lathrop* plurality emphasized, however, the limited scope of the question it was deciding: '[Lathrop's] compulsory enrollment imposes

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14. *Lathrop*, 367 U.S. at 849 (Harlan, J., concurring) (citations and footnotes omitted) "*A fortiori*" means " by even greater force of logic; even more so." Black's Law Dictionary (abrg'd. 7th ed. (Gardner, ed.)) (West Publishing 2000, p. 47).

15. This is the circle: *Hanson* stated that a worker's coerced membership in a labor organization presents "no more infringement" of his civil liberties than did a lawyer's coerced membership in an integrated bar. *Lathrop* stated that a lawyer's coerced membership in an integrated bar presents "no more infringement" of his civil liberties than did Mr. Hanson's coerced membership in a labor organization. This is classic circular reasoning.

> only the duty to pay dues... We therefore are confronted, as we were in [Hanson], only with a question of compelled financial support of group activities, not with involuntary membership in any other aspect.'"[16]

With respect, this Court should take the opportunity to review or discard *Lathrop* on this important First Amendment issue. Not only does it contain patent logical fallacies and incorrect assertions, the plurality holding is confusing, and the sharp dissents contained in *Lathrop* bring more force in the present day. Today, many lawyers believe that integrated bars have too much power, have grown into hegemons. In any event, courts should not be citing and relying on *Lathrop* for the broad proposition that coerced membership in integrated bars presents no First Amendment disability. The underpinnings of that holding are simply too shaky to withstand the strict scrutiny required when assessing such a fundamental right.

C. The Eleventh Circuit's jurisprudence in this area should be reviewed because it rests solely on *Lathrop v. Donohue*.

The issues in *Hanson* and *Lathrop* were identical and narrow: compelled financial support of group activities, and no other aspect of coerced association. *Keller* reiterated this. Here, however, Brown presents First and Fourteenth Amendment issues based on the fact and structure, the political nature, and the separateness, of the integrated bar. She concedes that as a professional

16. *Keller*, 496 U.S. at 9 (citations and footnote omitted).

she must pay a fee to the state. In a certain respect, her cause of action is governed not so much by *Lathrop* or *Keller*, but by *Abood*. *Keller* stands for the proposition that because an integrated state bar is so closely akin to a labor organization, the *Abood* case controls the disposition of Brown's broader claim for dissociation from the organization based on her freedom of conscience. In short, she can be compelled to pay; she cannot be forced to join.

"In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) (citations omitted). Clearly, in *Keller*, the Court felt that First Amendment issues involving coerced membership "in other aspects" do exist regarding integrated state bars. *Keller* implies that such rights or other issues exist, but it explicitly declined to address the broader issues. See *Keller*, 496 U.S. at 16.

This is where Ms. Brown's allegations intrude, and where the trial court's dismissal of her Second Amended Complaint fails as a matter of law. The trial court's order of dismissal relied almost solely on the Eleventh Circuit's holding in *Kaimowitz v. Florida Bar*, 996 F.2d 1151, 1154 (11th Cir. 1993). Appx. B at 15a; Appx. C at 36a. The trial court undoubtedly was merely following the law of the circuit.

In *Kaimowitz*, the Eleventh Circuit swaddled the Florida Bar in Eleventh Amendment immunity, and adopted Justice Harlan's singular view expressed in *Lathrop v. Donohue* that the *Hanson* case surely laid to rest all doubt that a state may constitutionally condition

the right to practice law upon membership in an integrated bar association. *Kaimowitz*,, 996 F.2d at 1154. In other words, the Eleventh Circuit's view is that every lawyer's fundamental, negative freedom of association, in every circumstance, was abrogated in every respect by this Court some 50 years ago. *See* Appx. A. If that is the official position of this Court, it would seem to run counter to the import of the line of cases discussed above, and it would rest, as demonstrated, on a single, flawed jurisprudential root, *Lathrop*. Brown respectfully requests a writ of certiorari to examine this important First Amendment issue. Otherwise, the extant case law can never be reconciled.

As stated, Brown sought a declaration regarding the continued viability of the Florida Bar's blanket Eleventh Amendment immunity, granted by *Kaimowitz*. She did so based on the supervening authority of this Court's seminal case, *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), which announced a sea change in Eleventh Amendment jurisprudence the year after *Kaimowitz* was decided. In her Amended Complaint seeking declaratory judgment on this issue, Brown alleged that the Bar has no nexus whatsoever with the Treasury of the State of Florida; that the state will never be liable or even potentially legally liable to pay any judgment entered against, or any debt incurred by, the Florida Bar; that the judicial branch provides no taxpayer-generated funds in any way to help defray the costs of operating the Bar, that no taxpayer-generated revenue constitutes any portion of any compensation to any salaried or other agent of the Bar, and that if the Bar were ever unable to meet any of its debt obligations for any reason, the state Treasury would not be implicated in any way. Because these provable facts coincide with the factors identified by the *Hess* Court

as driving the issue of Eleventh Amendment immunity regarding an "arm" of the state, Brown argues that the lower courts were wrong to keep resting on *Kaimowitz*.

D. Brown's equal protection and due process allegations invoke the broader associational rights alluded to in *Keller*.

Brown alleged that the system and process of lawyer regulation as implemented in tandem by the Florida Bar and the Supreme Court of Florida is separate and unequal, compared with the manner in which the state regulated all other licensed professionals, and that it results in unequal protection of the law to the detriment of her and all Florida lawyers. She sought a declaratory judgment as to the rational basis for the patent disparity. The disparity itself results directly from the fact that all other professions are regulated through a combination of statutory enactments and executive rulemaking.

The most significant disparity is the absence of the right of appeal by an independent tribunal. Florida lawyers, being self-regulated, are tried in the state supreme court, by agents of the supreme court, which then reviews the findings and recommendations made by the trial judge (or, referee) and issues a decision. From that decision there is no appeal. There is no recourse if the state court reverses the recommendation of its referee that Brown was innocent, as it did. Brown has no substantive right to have that final judgment reviewed. That represents a departure from accepted norms of procedural and substantive due process, and it differs significantly from the rights afforded to doctors, or barbers, or realty agents, or CPAs in Florida.

Instructive on this point is *Ibanez v. Fla. Dept. Of Business & Prof. Reg.*, 512 U.S. 136 (1994). In that case, Silvia Ibanez, a licensed Florida lawyer as well as a licensed certified public accountant ("CPA") was tried in a disciplinary case under Florida's Administrative Procedures Act (Ch. 120, Fla. Stat. Ann.). The hearing officer issued a recommended order finding Ibanez not guilty. The Board of Accountancy, however, rejected that recommendation and the Final Order of the Board of Accountancy found Ibanez guilty. (If the case had been against Ibanez' law license, this is where the case would have ended, with the state court acting as "the Board.") However, Ibanez exercised her right under Fla. Stat. §120.68, and appealed her case to the appropriate appellate tribunal. The following is quoted from *Ibanez*:

> "Ibanez appealed to the District Court of Appeal, First District, which affirmed the Board's final order *per curiam* without opinion. [ ] As a result, Ibanez had no right of review in the Florida Supreme Court."[17]

This illustrates the distinction Brown draws: The due process rights and safeguards that Ibanez enjoys as a Florida CPA are not available to her as a Florida lawyer. If she had sought a plenary appeal as a matter of right as to a "final order" after entry of the order finding that she had violated the *lawyer* advertising rules – as opposed to appealing the final order by the Board of Accountancy's advertising rules – Ibanez would have been procedurally barred from doing so.[18] In that scenario

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17. *Ibanez*, 512 U.S. at 142 (citations omitted).

18. The rules governing Ibanez' advertisements as a CPA and those governing her lawyer advertising were virtually indistinguishable.

her only recourse would be to pursue a petition for writ of certiorari in this Court, under the directives of the *Rooker-Feldman* doctrine. Any attempt by her to have a federal district court review her case would surely result in dismissal under that doctrine.[19] A writ of certiorari from the Supreme Court would be her only legal option. Such a severely limited chance for review (and solely on constitutional grounds) does not compare to her right as a non-lawyer Florida licensee to a plenary appeal of her case to an independent tribunal.

Based on this discrepancy, Ms. Brown stated a cause of action for unequal treatment. It is appropriate for a federal court to determine the state's rational basis for treating its lawyers as second-class licensees.

In closing, Brown urges the Court to consider the practical absurdity regarding the district court's suggestion that she pursue these issues in state court. The integration of the state bar with the state courts, the very issue being litigated, is the very issue that makes litigating these issues there, from a practical standpoint, pointless or quixotic. She respectfully urges the Court to grant the writ because the concept of forcing private attorneys to join a political collective created by the state is anathema to the republic's ideals. She conceives that Jefferson would be appalled at such a notion. The independence and freedom

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19. The "Rooker-Feldman doctrine" reserves to the U. S. Supreme Court the authority to review final decisions from a state's highest court and prohibits lower federal courts from exercising appellate jurisdiction over state court judgments. It derives from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The doctrine holds that 28 U.S.C. § 1257 prevents federal courts from asserting jurisdiction over final "judicial" determinations by state supreme courts. *See id.* at 476.

of lawyers should not be inhibited or circumscribed in any such manner, for whatever state purpose, for lawyers are the last line of defense in a republican democracy.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED DECEMBER 28, 2010

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-12459
Non-Argument Calendar

D.C. Docket No. 2:08-cv-00308-JES-SPC.

ANNA L. BROWN,

Plaintiff - Appellant,

versus

THE FLORIDA BAR, THE SUPREME COURT OF FLORIDA, R. FRED LEWIS, CHARLES T. WELLS, HARRY LEE ANSTEAD, et al.,

Defendants - Appellees.

Appeal from the United States District Court for the Middle District of Florida

(December 28, 2010)

Before TJOFLAT, CARNES and BARKETT, Circuit Judges.

Appendix A

PER CURIAM:

Anna L. Brown appeals the district court's denial of her claim that the Florida courts' requirement that practicing attorneys be members of the Florida Bar violates her Freedom of Association and her Equal Protection Rights. But Brown concedes that Circuit precedent forecloses her suit, *see Kaimowitz v. The Florida Bar*, 996 F.2d 1151 (11th Cir. 1993), and she presents no compelling reason for overturning *Kaimowitz*'s holding that mandatory bar membership does not violate the Constitution. *See also Keller v. State Bar of California*, 496 U.S. 1, 14 (1990) (upholding over First Amendment challenge mandatory Bar dues so long as their use was limited to furthering the goals of "regulating the legal profession or improving the quality of legal services"); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225, 238 (1956) (upholding compelled union membership as "no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar"). Thus, the court did not err in dismissing her suit.[1] Nor did the court err in concluding a trial judge's membership in the Florida Bar did not require recusal.

AFFIRMED.

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1. Having rejected the appeal on the merits, and no Judge in active service having requested that the court be polled on hearing the case en banc, we deny the Petition for Hearing En Banc as moot.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION, DATED MARCH 22, 2010

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 2:08-cv-308-FtM-29SPC

ANNA L. BROWN,

Plaintiff,

vs.

THE FLORIDA BAR; THE SUPREME COURT OF FLORIDA; R. FRED LEWIS; CHARLES T. WELLS; HARRY LEE ANSTEAD; BARBARA J. PARIENTE; PEGGY A. QUINCE; RAOUL G. CANTERO; KENNETH B. BELL,

Defendant.

OPINION AND ORDER

This matter comes before the Court on The Florida Bar's Motion to Dismiss Second Amended Complaint and Incorporated Memorandum of Law (Doc. # 61) filed on July 7, 2009, and Defendants The Supreme Court of Florida and Florida Supreme Court Justices R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince, Raoul G. Cantero and Kenneth Bell's Motion to

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Dismiss Second Amended Complaint (Doc. # 64) filed on July 20, 2009. Plaintiff filed a Response to both Motions (Doc. # 68) on September 14, 2009. Plaintiff filed a Motion for Leave to Supplement Response *Nunc Pro Tunc* (Doc. # 73), which will be granted, and plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss (Doc. # 70) will be considered. As a result, Defendants The Supreme Court of Florida and Florida Supreme Court Justices R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince, Raoul G. Cantero and Kenneth Bell's Motion to Strike "Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss" (Doc. # 71) will be denied.

I.

In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 93 (2007); *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). "To survive dismissal, the complaint's allegations must plausibly suggest that the [plaintiff] has a right to relief, raising that possibility above a speculative level; if they do not, the plaintiff's complaint should be dismissed." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). The former rule--that "[a] complaint should be dismissed only if it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief," *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004)--has been retired by *Twombly*. *James River*

Ins. Co., 540 F.3d at 1274. Thus, the Court engages in a two-step approach: "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). The Court need not accept as true legal conclusions or mere conclusory statements. *Id.* Dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Brown v. Crawford County*, 960 F.2d 1002, 1009-10 (11th Cir. 1992).

II.

Anna Brown (plaintiff or Brown) is a black female attorney licensed to practice law in the State of Florida. Brown's first federal suit against The Florida Bar was dismissed, and the dismissal was affirmed on appeal based on Eleventh Amendment immunity. *Brown v. Florida Bar*, 243 Fed. Appx. 552 (11th Cir. 2007). In the current case, Brown sues The Florida Bar, the Supreme Court of Florida, and its individual Justices seeking declaratory and injunctive relief. A six-count Amended Complaint (Doc. # 33) was premised upon two separate and unrelated disciplinary proceedings initiated by The Florida Bar against Brown. In a May 29, 2009 Opinion and Order (Doc. # 59), the Court dismissed Brown's Amended Complaint. Plaintiff was granted leave to file a second amended complaint as to the claim related to her facial challenge to the constitutionality of The Florida Bar and The Rules Regulating the Florida Bar. (*Id.* at pp. 18-19.)

Appendix B

On June 18, 2009, plaintiff filed a two-count Second Amended Complaint (Doc. # 60) against The Florida Bar, The Supreme Court of Florida, and its current Justices. Brown sets forth in some detail her view of her past disciplinary proceedings with The Florida Bar and the Supreme Court of Florida and, to understate the matter, her dissatisfaction with both the procedures and outcomes of those proceedings. (*Id.* at ¶¶ 11-87.) This experience, Brown asserts, brings her to the point where she "objects to her continued compelled membership in the Florida Bar and demands to be relieved of the same." (*Id.* at ¶ 88.)

Count I seeks a declaratory judgment pursuant to the federal Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiff identifies the issue as follows: "Can the mandatory state bar constitutionally exist within this state where the so-called "right-to-work" prohibition against closed shops is part of the state constitution?" (*Id.* at ¶ 104.) Brown asserts that she "wishes no longer to be an involuntary member of the labor organization called the Florida Bar, though she may wish to gain or regain work as a practicing lawyer in this state. She believes she has the right to opt out of Bar membership, and that she cannot be compelled to remain a member of a labor organization as a precondition to practicing law in Florida." (*Id.* at ¶ 105.) Brown therefore seeks a declaratory judgment that "the Florida Bar is unconstitutionally constituted, is sufficiently akin to, and amounts to, an impermissible closed shop under pertinent law, and that accordingly, she is not required to maintain her membership in such organization as a condition of working as a licensed attorney in the State of Florida, plus any and all such

further relief this Court may deem just and proper." (*Id.* at p. 19.)

Count II seeks injunctive relief voiding Brown's compulsory membership in The Florida Bar. Brown asserts that she "has attained the right to practice law notwithstanding, and regardless of, her compulsory membership in the pseudo-organization called the Florida Bar." (*Id.* at ¶ 106.) Brown seeks to preliminarily and permanently enjoin The Florida Bar and the Supreme Court of Florida from continuing to compel her membership as a precondition to her practice of law (*id.* at ¶¶ 110, 111), and seeks an injunction "voiding her Bar membership while preserving her property interest in her license to practice law and therefore her ability and right to continue to practice law in the Florida state courts, plus any and all such further relief this Court may deem just and proper." (*Id.* at pp. 20-21.)

III.

Defendants seek dismissal of the Second Amended Complaint on three grounds. First, defendants argue that the case is not fit for adjudication because there is no actual case or controversy. Second, defendants argue that as a matter of law plaintiff is not entitled to the declaratory judgment or injunction she seeks. Third, defendants argue that the Court should exercise its discretion and decline to exercise supplemental jurisdiction as to the claim that The Florida Bar membership requirement violates Florida law.

Appendix B

Count I Declaratory Judgment Regarding Integrated Bar

A. Declaratory Judgment Act "Controversy"

Since Brown seeks declaratory relief pursuant to the Declaratory Judgment Act of 1934, 28 U.S.C. § 2201, *et seq.*, defendants' reliance on Florida law (Doc. # 61, pp. 2-3) is misplaced. It is certainly true, however, that federal courts are courts of limited jurisdiction, and that Article III, § 2 of the United States Constitution limits the judicial power of federal courts to certain types of "cases" or "controversies". While federal courts were initially thought to lack subject matter jurisdiction to issue a declaratory judgment, *Willing v. Chicago Auditorium Ass'n*, 277 U.S. 274 (1928), Congress was found to have acted within its authorized Article III power when it enacted the Declaratory Judgment Act of 1934. *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 239-40 (1937). The Declaratory Judgment Act specifically requires "a case of actual controversy" within the court's jurisdiction:

> In a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking declaration, whether or not future relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). This provision "manifestly has regard to the constitutional provision and is operative

only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition." *Haworth*, 300 U.S. at 239-40. Thus, "a declaratory judgment may be issued only in the case of an actual controversy." *Malowney v. Federal Collection Deposit Group*, 193 F.3d 1342, 1347 (11th Cir. 1999) (internal quotation omitted).

To determine whether a "controversy" actually exists, *Haworth* still provides useful benchmarks:

> A 'controversy' in this sense must be one that is appropriate for judicial determination. [ ] A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. [ ] The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. [ ] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. [ ] Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. [ ] And as it is not essential to the exercise of the judicial power that an injunction

> be sought, allegations that irreparable injury is threatened are not required.

Haworth, 300 U.S. at 240-41 (internal citations omitted). "The plaintiff must allege facts from which the continuation of the dispute may be reasonably inferred. Additionally, the continuing controversy may not be conjectural, hypothetical, or contingent; it must be real and immediate, and create a definite, rather than speculative threat of future injury." *Malowney*, 193 F.3d at 1347 (internal citation and quotation omitted). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007)(quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Defendants argue that Brown has failed to demonstrate that she has an immediate or imminently threatened injury and that the facts do not show a substantial controversy between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. (Doc. # 61, p. 4.) Brown responds that there is an actual controversy in that she has a substantial interest in practicing law and that in order to maintain her status as an attorney, she must remain an involuntary member of the Bar. Considering plaintiff's past experience with The Florida Bar, plaintiff would rather resign her membership. (Doc. # 60, ¶¶ 91-95.)

Further, Brown argues, until the declaratory judgment issues, she is compelled to maintain her involuntary membership or else she will be denied her privilege to practice law, notwithstanding her licensing, education, and experience. (*Id.*)

The Court finds that the Second Amended Complaint satisfies the "controversy" requirement of the federal Declaratory Judgment Act. Plaintiff has stated her position clearly - she claims she may lawfully practice law in the State of Florida without being a member of The Florida Bar, and wishes to opt out of such membership without sanction. Defendants clearly are of a view that this is not a valid option for an attorney who wishes to practice law in the State of Florida. This is a substantial dispute, with no middle position available. The Second Amended Complaint also sets forth in detail plaintiff's motivation - the personal disciplinary history which plaintiff views as abusive. Whether plaintiff is right or wrong in her beliefs as to her disciplinary proceedings, there can be no doubt that the parties are adverse and that the dispute is not hypothetical, abstract or moot. The controversy also clearly touches the legal relation of parties, and unilateral action by plaintiff could subject her to severe sanctions. For example, if plaintiff was to resign from The Florida Bar and continue to practice law, she would face punishment. *See* R. REGULATING FLA. BAR 1-8.2 & 10; *see also, Sperry v. Florida*, 373 U.S. 379, 383 (1963). Similarly, if plaintiff was to simply stop paying Bar dues, she would be suspended and could not practice law. A person is not required to subject herself to such government sanction as a precondition to a declaratory action. *MedImmune, Inc.*, 549 U.S. at 128-29.

> Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat--for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

Id. Accordingly, the Court rejects defendants' argument that there is no justiciable controversy set forth in the Second Amended Complaint.

B. Entitlement to Relief

Brown alleges that compelled membership in The Florida State Bar deprives her of the constitutional property interest in her license to practice law under the Fourteenth Amendment. (Doc. # 60, ¶ 91.) Brown also asserts that her involuntary membership in the Florida Bar is a violation of her First and Fourteenth Amendment right of association. (*Id.* at ¶ 113.) Further, Brown asserts that such compelled bar membership violates the Florida state constitution, which guarantees her the right to work. (*Id.* at ¶¶ 95-96.) Defendants argue that dismissal is appropriate as a matter of law since plaintiff is not entitled to the declaration or injunction she seeks because the law has already decided the issues against her. Defendants allege that it is well settled law

that the State may constitutionally require a lawyer to be a member of an integrated bar, and that the Court should not reach issues solely of Florida law.

The Florida Bar is an entity commonly referred to as an "integrated bar," that is, "an association of attorneys in which membership and dues are required as a condition of practicing law in a State." *Keller v. California Bar*, 496 U.S. 1, 5 s(1990). The Supreme Court of Florida exercises supervisory authority over The Florida Bar pursuant to article V, section 15, of the Florida Constitution, which provides that "[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." *Liberty Counsel v. Florida Bar Bd. Of Governors*, 12 So. 3d 183, 184 (Fla. 2009).

The Court finds that compelled membership in an integrated bar does not violate plaintiff's First Amendment rights. In *Keller* the Supreme Court discussed that general proposition in the following terms:

> In *Lathrop v. Donohue*, 367 U.S. 820 [ ] (1961), a Wisconsin lawyer claimed that he could not constitutionally be compelled to join and financially support a state bar association which expressed opinions on, and attempted to influence, legislation. Six Members of this Court, relying on *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 [ ] (1956), rejected this claim.

Appendix B

"In our view the case presents a claim of impingement upon freedom of association no different from that which we decided in [*Hanson*]. We there held that § 2, Eleventh of the Railway Labor Act . . . did not on its face abridge protected rights of association in authorizing union-shop agreements between interstate railroads and unions of their employees conditioning the employees' continued employment on payment of union dues, initiation fees and assessments .... In rejecting Hanson's claim of abridgment of his rights of freedom of association, we said, 'On the present record, there is no more an infringement or impairment of First Amendment rights than there would be in the case of a lawyer who by state law is required to be a member of an integrated bar.' [ ]. Both in purport and in practice the bulk of State Bar activities serve the function, or at least so Wisconsin might reasonably believe, of elevating the educational and ethical standards of the Bar to the end of improving the quality of the legal service available to the people of the State, without any reference to the political process. It cannot be denied that this is a legitimate end of state policy. We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers, even

> though the organization created to attain the objective also engages in some legislative activity. Given the character of the integrated bar shown on this record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable annual dues, we are unable to find any impingement upon protected rights of association." *Lathrop*, 367 U.S. at 842-843[ ].
>
> Justice Harlan, joined by Justice Frankfurter, similarly concluded that "[t]he *Hanson* case [ ] decided by a unanimous Court, surely lays at rest all doubt that a State may Constitutionally condition the right to practice law upon membership in an integrated bar association, a condition fully as justified by state needs as the union shop is by federal needs."

Keller, 496 U.S. at 7-9 (internal citations omitted). In *Kaimowitz v. The Florida Bar*, the Eleventh Circuit adopted a district court opinion which addressed the very claim at issue in this case. *Kaimowitz v. The Florida Bar*, 996 F.2d 1151, 1153 (11th Cir. 1993). The district court held that compelled membership in The Florida Bar did not violate the First Amendment right to freedom of association, relying upon *Lathrop v. Donohue*, 367 U.S. 820 (1961). *See also Gibson v. The Florida Bar*, 798 F.2d 1564 (11th Cir. 1986).

The Court also finds that compulsory bar membership does not violate plaintiff's Fourteenth Amendment rights. While Brown alleges that she has a property interest

under the Fourteenth Amendment to her law license, (Doc. # 68, p. 5), this is not supported by the case law. "There is no vested right in an individual to practice law." *Ippolito v. Florida*, 824 F. Supp. 1562, 1573 (M.D. Fla. 1993). The right to practice law is not a privilege or immunity within the meaning of the Fourteenth Amendment. *Schware v. Board of Bar Exam. of N.M.*, 353 U.S. 232, 239 n.5 (1957); *State ex rel. Florida Bar v. Sperry*, 140 So. 2d 587, 589 (Fla. 1962), *vacated on other grounds*, 373 U.S. 379 (1963).

The Florida Constitution has a right to work provision, Article I, section 6, Florida Constitution, which provides: "Right to Work. The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike." FL. CONST. ART. I, § 6. The federal constitutional principles do not change simply because Florida has adopted such a "right to work" provision in its Constitution.

Plaintiff, however, also alleges that mandatory bar membership violates the Florida Constitution's right to work provision, and "seeks to have the federal courts decide the legitimacy of the state's original order 'integrating' the bar, for it is by such order that she is compelled to join what amounts to a labor organization as a precondition to her employment as a lawyer in this state." (Doc. # 68, p. 8.) In other words, plaintiff asserts that even if Florida could constitutionally require mandatory bar membership, the process by which this was accomplished in Florida

violates Florida law. Defendants urge the Court to decline to exercise supplemental jurisdiction as to this purely state law claim. Whether compulsory bar membership violates Florida's "right to work" constitutional provision is a purely state law issue.

It is clear that the Court has subject matter jurisdiction over plaintiff's state law claim because it was brought with her federal claims and is so related to those claims that "they form[ed] part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). This jurisdiction continues even after the Court dismisses all the federal claims, *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 129 S.Ct. 1862, 1867 (2009), but at that point a district court must exercise its discretion to determine whether to continue to exercise supplemental jurisdiction. 28 U.S.C. § 1367(c). The Court will exercise this discretion by not entertaining plaintiff's state law claim. The Supreme Court of Florida is the final arbiter of Florida law, and plaintiff relies upon what she believes to be contradictory Florida laws in her argument that The Florida Bar was improperly integrated. (*See* Doc. # 68, p. 8.) Florida courts are better suited to resolve such issues of Florida law. Additionally, if after the Florida courts have resolved plaintiff's claims, and plaintiff still seeks federal court review, plaintiff may seek a writ of certiorari to the United States Supreme Court. 28 U.S.C § 1257(a).

Finally, plaintiff seems to suggests that there may be a violation of federal labor statutes, but that it "will take discovery and litigation to find out whether such could be." (Doc. #68, p. 14.) Plaintiff has not stated any such cause of

action, and there is no basis to allow discovery in this case so she can determine if a different claim may be plausible.

Count II: Injunctive Relief Voiding Compulsory Membership

"A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1097 (11th Cir. 2004). The burden of persuasion for each of the four requirements is upon the movant. *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000)(en banc). "The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success." *Klay*, 376 F.3d at 1097 (quoting *Siegel*, 234 F.3d at 1213 (Carnes, J., dissenting)). An injunction is "an extraordinary remedy" which is only available when a "legal right has been infringed by an injury for which there is no adequate legal remedy and which will result in irreparable injury if the injunction does not issue." *Alabama v. United States Army Corps of Eng'rs*, 424 F.3d 1117, 1127 (11th Cir. 2005).

Brown seeks to enjoin the Florida Supreme Court and the Florida Bar from further compelling her membership as a precondition to her ability or right to

practice law. Plaintiff asserts that she can show that there is a substantial likelihood of success on the merits because she "is correct in asserting that the Bar is akin to a labor organization . . . and it is irrefutable that the Supreme Court integrated the Florida bar at a time when it was illegal to create a labor organization and require any attorney to be a member thereof . . . ." (Doc. # 60, ¶ 112.) Defendants argue that plaintiff has no likelihood of success on the merits. They argue that the United States Supreme Court has repeatedly recognized the authority of states to regulate lawyers including the requirement of dues and compulsory membership. (Doc. # 61, p. 4; Doc. # 64, p. 8.)

The Court finds that Brown cannot establish a substantial likelihood of success on the merits of her First and Fourteenth Amendment claim because it is well settled law that compulsory bar membership is constitutional. Since Brown cannot establish a substantial likelihood of success on the merits, she is not entitled to an injunction. ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd., 557 F.3d 1177, 1198 (11th Cir. 2009). Thus, the Court will grant Defendants' Motions to Dismiss Count II of the Second Amended complaint.

Accordingly, it is now

ORDERED:

1. The Florida Bar's Motion to Dismiss Second Amended Complaint (Doc. # 61) is **GRANTED**, and the Second Amended Complaint is dismissed for the reasons stated above.

2. Defendants The Supreme Court of Florida and Florida Supreme Court Justices R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince, Raoul G. Cantero and Kenneth Bell's Motion to Dismiss Second Amended Complaint (Doc. #64) is **GRANTED**, and the Second Amended Complaint is dismissed for the reasons stated above.

3. Plaintiff filed a Motion for Leave to Supplement Response *Nunc Pro Tunc* (Doc. # 73) is **GRANTED** and plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss (Doc. # 70) is accepted as filed.

4. Defendants The Supreme Court of Florida and Florida Supreme Court Justices R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince, Raoul G. Cantero and Kenneth Bell's Motion to Strike "Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss" (Doc. # 71) is **DENIED**.

5. The Clerk of the Court shall enter judgment in favor of the defendants and against plaintiff. The Clerk shall terminate all pending motions and deadlines as moot and close the case.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of March, 2010.

/s/
JOHN E. STEELE
United States District Judge

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION, DATED MAY 29, 2009

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 2:08-cv-308-FtM-29SPC

ANNA L. BROWN,

Plaintiff,

vs.

THE FLORIDA BAR; THE SUPREME COURT OF FLORIDA; R. FRED LEWIS; CHARLES T. WELLS; HARRY LEE ANSTEAD; BARBARA J. PARIENTE; PEGGY A. QUINCE; RAOUL G. CANTERO; KENNETH B. BELL,

Defendant.

OPINION AND ORDER

This matter comes before the Court on defendants Justices Raoul G. Cantero, Kenneth B. Bell, R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince and the Supreme Court of Florida's Motion to Dismiss (Doc. #40) and on The Florida Bar's Motion to Dismiss (Doc. #43). Plaintiff filed

a consolidated Memorandum of Law (Doc. #45) opposing both motions.

I.

Defendants seek to dismiss all six counts of the Amended Complaint (Doc. #33) for various reasons. The Court would note that the standard for a motion to dismiss set forth by defendants (Doc. #40, pp. 5-6) is largely incorrect. In deciding a Rule 12(b)(6) motion to dismiss, it is certainly true that the Court must accept all well-pleaded factual allegations in a complaint as true and take them in the light most favorable to plaintiff. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). "To survive dismissal, the complaint's allegations must plausibly suggest that the [plaintiff] has a right to relief, raising that possibility above a speculative level; if they do not, the plaintiff's complaint should be dismissed." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270. 1274 (11th Cir. 2008)(citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007)). The former rule -- that "[a] complaint should be dismissed only if it appears beyond doubt that the plaintiffs can prove no set of facts which would entitle them to relief," *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) -- has been retired by *Twombly*. *James River Ins. Co.*, 540 F.3d at 1274. Thus, the Court engages in a two-step approach: "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, No. 07-1015, __ S. Ct. __, 2009 WL 1361536, *2 (May 18, 2009).

Appendix C

II.

Anna L. Brown (Brown or plaintiff) is a black female attorney licensed to practice law in the State of Florida. This is Brown's second federal case against The Florida Bar. The first action, seeking monetary damages, was dismissed based on Eleventh Amendment sovereign immunity and absolute immunity; the dismissal was affirmed on appeal based on Eleventh Amendment immunity. *Brown v. Fla. Bar*, 243 Fed. Appx. 552 (11th Cir. 2007). Brown now sues The Florida Bar, The Supreme Court of Florida, and its justices seeking declaratory and injunctive relief but no monetary relief.

The operative pleading is plaintiff's Amended Complaint (Doc. #33). Plaintiff's claims are premised upon two separate and unrelated disciplinary proceedings initiated by The Florida Bar against Brown, which she refers to as Case No. 1 and Case No. 2.

A. Case No. 1:

In November 2004, The Florida Bar filed Case No. 1 alleging that Brown had represented two criminal defendants in 2001 despite the existence of a conflict of interest. The court-appointed referee granted Brown's motion to dismiss, found that the Complaint failed to state a cause of action for conflict of interest and could not do so, and dismissed the conflict of interest allegations with prejudice. The referee subsequently denied Brown's motion for attorney fees and costs, holding that such fees were never recoverable against The Florida Bar.

The Florida Bar then filed an Amended Complaint, and the same referee conducted a trial. The referee found that Brown had made a misrepresentation to the court, but that she had not intended to deceive anyone. The referee also found that Brown had represented one of the criminal defendants with a lack of diligence and a lack of client communication, and this was sufficient to warrant a recommended finding of guilt as to violation of two Rules Regulating the Florida Bar.

The Florida Bar appealed the referee's decision dismissing the conflict of interest claim to the Florida Supreme Court. In an October 12, 2006 Order, the Florida Supreme Court reversed the referee's dismissal and remanded the case. The Florida Supreme Court found that the original Complaint stated a cause of action that Brown had represented two clients with adverse interests.

After a hearing on remand, the same referee entered a directed verdict against The Florida Bar. The referee found that no conflict had been proven by clear and convincing evidence and thus no violation of the Rules Regulating the Florida Bar had been established.

Both Brown and The Florida Bar appealed this decision to the Florida Supreme Court, which on January 17, 2008, reversed the referee in part and imposed a ninety day suspension of plaintiff's license. *See Fla. Bar v. Brown*, 978 So. 2d 107 (Fla. 2008). The Supreme Court stated in its Suspension Order that a motion for rehearing would not toll the suspension of Brown's license to practice law. Brown filed what she believed to be a meritorious motion

for rehearing, but the suspension order was not tolled. Brown asserts that Florida Supreme Court precedent and the Florida Rules of Appellate Procedure allowed a motion for rehearing, the effect of which is to suspend the rendition of the decision, order, judgment or decree. Brown asserts that the Florida Supreme Court therefore rendered the anti-tolling provision of its Suspension Order in violation of its own case authority and rules. The Florida Supreme Court ultimately denied the motion for rehearing.

Brown asserts that the Florida Supreme Court improperly discounted and ignored the findings made by the referee which were favorable to her, and impermissibly substituted its own factual findings favorable to The Florida Bar, contrary to "a veritable mountain" of its own case law. (Doc. #33, ¶ 72.) Brown also asserts that the substituted findings and legal conclusions are "demonstrably incorrect." (*Id.* at ¶ 75.) Further, Brown asserts that such an "obtuse result" stemmed from unconscious or institutional bias favoring The Florida Bar, or bias or bad faith against Brown personally, and an institutional bias against blacks in general. (*Id.* at ¶ 76.)

Brown additionally asserts that the Florida Supreme Court's decision in her case announced new law governing lawyers, i.e., that engaging in a mere potential conflict of interest is sufficient reason to suspend a law license. After this decision, Brown asked The Florida Bar to investigate a lawyer based upon information in a newspaper article. Brown asserts that, while she has no personal knowledge of the facts, the article referred to a white, male, well-

connected attorney who "the article strongly implied, had engaged in a *potential* conflict of interest" in connection with energy advice being given to the Governor. (Doc. #33, ¶ 79.) The Florida Bar responded that the newspaper article provided no specific allegations of fact that would support a clear and present conflict of interest, and therefore a file would not be opened. Brown alleges that the refusal by The Florida Bar to open its own inquiry was not because of anything in the article, "but because [the attorney] is white, male, and well-connected politically." (*Id.* at ¶ 81.) Brown submitted a formal complaint against the lawyer, but has heard little or nothing of its progress as of the filing of the Amended Complaint. (*Id.* at ¶ 82.)

B. Case No. 2:

On April 7, 2006, a Grievance Committee of The Florida Bar entered a finding of probable cause against Brown for violation of the intentional misconduct rule of the Rules Regulating The Florida Bar. Afterwards, Brown's attorney wrote a letter to The Florida Bar asking for clarification or explanation as to how the evidence established a violation of that rule. No explanation was forthcoming, although on April 11, 2006, The Florida Bar proposed settlement of the matter with a public reprimand. This offer was not accepted, but The Florida Bar did not file a formal complaint for over 22 months. Brown alleges that The Florida Bar intentionally and in bad faith delayed the filing until after the Florida Supreme Court reversed Case No. 1, and that this prejudices her because discipline is generally progressive in nature.

Appendix C

After trial, the same referee as in Case No. 1 found Brown guilty of violating Rule 4-8.4(d) for engaging in conduct that was prejudicial to the administration of justice by submitting a pleading containing erroneous information. The referee recommended a public reprimand. Although conceding that she negligently customized a form template which resulted in errors in one of the paragraphs, Brown asserts that Case No. 2 is without substantial merit because her inadvertent insertion of incorrect information cannot reasonably be viewed as clearly and convincingly proving the elements of the Rule violation. This matter is now before the Florida Supreme Court, and Brown believes the Florida Supreme Court will again suspend her law license for reasons unrelated to the merits of the case.

III.

A. All Counts: Individually Named Justices

No relief is requested in any count as to any of the named defendants other than The Florida Bar and/or the Florida Supreme Court. No facts are alleged as to the conduct of the individual justices. In the absence of such facts and any requested relief, the individually named justices are dismissed from all counts.

B. Count I: Compel Disciplinary Proceedings Against Another Lawyer

In Count I, Brown seeks to enjoin The Florida Bar from further delaying or ignoring her complaint against

the white, male, well-connected attorney. (Doc. #33, ¶ 84.) More specifically, the "wherefore" clause of Count I seeks an order enjoining The Florida Bar "from further discriminating against [Brown] in the context of taking other Florida lawyers to task for engaging in mere *potential* conflicts of interests, based on their conduct and not their social class, political connections, skin color, or purse, plus any and all such further relief as this Court deems just and proper." (Doc. #33, p. 14.)

No relief is requested as to the Florida Supreme Court. In the absence of such requested relief, the Florida Supreme Court is dismissed from Count I.

As to The Florida Bar, the Court finds that Count I fails to state a claim upon which relief may be granted.[1] The purpose of an attorney disciplinary proceeding is to protect the public, not to vindicate private rights. *Application of Harper*, 84 So. 2d 700, 702 (Fla. 1956); *Tyson v. Fla. Bar*, 826 So. 2d 265 (Fla 2002). Therefore, "[n]o private rights except those of the accused attorney are involved." *Harper*, 84 So. 2d. at 702. *See also Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n*, 152 So. 2d 723 (Fla. 1963); *Gonczi v. Countrywide Home Loans, Inc.*, 271 Fed. Appx. 928, 929-30 (11th Cir. 2008).

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1. Defendants incorrectly read Count I to challenge Brown's own disciplinary proceedings. While Count I is encumbered with many allegations regarding Brown's first disciplinary proceeding, the only relief requested relates to the failure to initiate disciplinary proceedings against another attorney. Properly read, the Court does not believe that either *Younger* or *Rooker-Feldman* apply to Count I.

"The role of the complaining witness in a bar disciplinary proceeding, however, is somewhat analogous to that of the victim in a criminal proceeding and, like crime victims, complaining witnesses cannot demand that the prosecuting authority file criminal charges against a particular individual based on alleged criminal behavior." *Tyson*, 826 So. 2d at 267. Accordingly, Brown has no ability to compel disciplinary action against the other lawyer. As such, she has no standing to assert a claim in Count I. *Smith v. Shook*, 237 F.3d 1322, 1324-25 (11th Cir. 2001). Further, the Amended Complaint sets forth no well-pleaded facts that suggest the conduct of this lawyer was similar to Brown's conduct, and therefore no well-pleaded facts which would support even an inference that the failure to pursue disciplinary action was based on race, gender, or some other suspect classification. Therefore, Count I will be dismissed as to The Florida Bar.

C. Count II: Enjoin Bar Proceedings Against Brown

In Count II, Brown seeks to enjoin The Florida Bar and the Florida Supreme Court from taking further action against her in prosecution of Case No. 2. In essence, Brown asserts that Case No. 2 is without substantial merit but she believes the Florida Supreme Court will again suspend her license to practice law for improper reasons other than the merits of the case, i.e., The Florida Bar does not like Brown, both The Florida Bar and the Florida Supreme court are biased against her because "she has made it a point to stand up for her rights in a system that is little more than a discriminatory farce operated by the Bar with the Supreme Court's imprimatur and blessing"

(Doc. #33, ¶ 112), and she filed a motion for fees and costs tracking the language of FLA. STAT. § 57.105 (Doc. #33, ¶ 113).

It is well settled that a federal court has a "virtually unflagging" obligation to adjudicate claims within its jurisdiction, subject to certain exceptions aimed at avoiding undue interference with state proceedings. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989); *31 Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003). Two exceptions apply here.

First, a federal district court does not have authority to issue an injunction staying a state court proceeding unless expressly authorized by an Act of Congress, where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. 28 U.S.C. § 2283; *Bayshore Ford Trucks Sales, Inc. v. Ford Motor Co.*, 471 F.3d 1233, 1249-50 (11th Cir. 2006). None of the circumstances warranting a federal injunction apply in this case.

The second applicable exception to a federal court's obligation to adjudicate claims within its jurisdiction is founded upon *Younger v. Harris*, 401 U.S. 37 (1971), a criminal case which has been extended to disciplinary proceedings initiated by a state bar association. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *ACLU v. Fla. Bar*, 999 F.2d 1486, 1493 n.15 (11th Cir. 1993). *Younger* is a narrow and extraordinary exception to the duty of a district court to adjudicate a controversy properly before it. *Green v. Jefferson County Comm.*, 563 F.3d 1243, 1251 (11th Cir. 2009)(internal

quotation and citation omitted). *Younger* abstention is applicable if (1) there is a pending state judicial proceeding and the requested federal remedy would unduly interfere with that state proceeding, (2) the state proceeding implicates important state interests, and (3) the state proceeding provides plaintiff an adequate opportunity to raise its federal constitutional challenges. *Middlesex*, 457 U.S. at 432; *31 Foster Children*, 329 F.3d at 1274-80; *Wexler v. Lepore*, 385 F.3d 1336, 1339 (11th Cir. 2004). If these factors are satisfied, abstention is applicable unless there is a showing of manifest bad faith, harassment, or some extraordinary circumstance that makes abstention inappropriate. *Middlesex County*, 457 U.S. at 435.

The Court finds that the *Younger* abstention doctrine applies to Count II. The disciplinary proceeding initiated by The Florida Bar was pending as of the filing of the Complaint in this case, and apparently is still pending before the Florida Supreme Court. The Florida Bar's disciplinary proceedings are judicial in nature. *In re Calvo*, 88 F.3d 962, 965 (11th Cir. 1996). The requested relief would certainly unduly interfere with such proceedings, causing them to literally stop. The disciplinary proceedings against Brown implicate important state interests because a state "has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." *Middlesex*, 457 U.S. at 434. *See also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995). Finally, the Florida Supreme Court can address federal constitutional claims asserted by plaintiff during the course of the disciplinary proceedings. *Corbin v. Supreme Court of Fla.*, 233 Fed. Appx. 917, 919 (11th Cir. 2007) (Florida citations omitted).

Plaintiff's Response (Doc. #45) does not address the *Younger* abstention doctrine, however, portions of the Amended Complaint and plaintiff's previous filings assert that defendants are proceeding in bad faith. (Docs. #31, p. 3-4; #44.) The Court finds that Brown has not properly plead facts tending to show bad faith. Brown's personal opinions and conclusory statements fail to satisfy the pleading requirements. *Iqbal*, 2009 WL at *2. The conduct of the Florida Supreme Court in deciding the case does not suggest bad faith, since that court has rejected a referee's discipline of admonishment and imposed suspension in other cases, *e.g.*, *Fla. Bar v. Ticktin*, No. SC07-369, 2009 WL 1406251 (Fla. May 21, 2009) (rejecting admonishment in favor of 91 day suspension) and has expressly directed that the filing of a motion for rehearing would not toll suspension or disbarment in other cases, *see, e.g.*, *Fla. Bar v. Mogul*, No. SC08-2240, 2009 WL 1364885 (Fla. May 14, 2009); *Fla. Bar v. Krocka*, No. SC09-790, 2009 WL 1228993 (Fla. May 4, 2009); *Fla. Bar v. Barger*, No. SC09-630, 2009 WL 1099988 (Fla. Apr. 23, 2009); *Fla. Bar v. Behm*, No. SC 08-85, 2009 WL 1099989 (Fla. Apr. 23, 2009); *Fla. Bar v. Phillips*, No. SC08-1910, 2009 WL 1099991 (Fla. Apr. 23, 2009).

Accordingly, Count II will be dismissed as to all defendants.

D. Counts III and IV: Declaratory Judgments as to Past Bar Proceeding

In Count III, Brown seeks a declaratory judgment as to the following: (1) That her "right to procedural due process was violated by the Bar in continuing to prosecute

her improperly and by the Supreme Court in overturning the referee's factual findings and recommendation of guilt" as to Rule 4-1.7(b) because Brown prevailed before the referee on remand of Case No. 1 as to the alleged violation of Rule 4-1.7(b) (Doc. #33, ¶ 139); (2) that Brown should not have been deprived of her license to practice law during the pendency of her Motion for Rehearing, and the failure to toll the suspension during the pendency of the motion was a violation of her procedural due process rights under Florida state law and the U.S. Constitution (Doc. #33, ¶ 141); (3) that Brown's substantive due process rights were violated when the state appellate court substituted its factual findings for those of the trial court, causing a deprivation of her property interest in her law license (Doc. #33, ¶ 142); (4) that the entire state court proceeding violated fundamental fairness and due process because the prosecuting entity is an official arm of the same court in which Brown was tried and in which her sole appellate rights and remedies lay, i.e., that the Florida separation of powers doctrine precludes Brown "from being forced to undergo a proceeding that she is predestined to lose, because the very court that controls every aspect of the entire proceeding has a conscious or subconscious interest or intent to uphold the legitimacy of the prosecuting entity and its efforts" (Doc. #33, ¶ 143); and (5) that Brown's rights under the Fourteen Amendment were violated because "she can never obtain an award for attorney's fees under law for defending insubstantial claims or contentions pursued by the Bar, due solely to her status as an attorney" (Doc. #33, ¶ 144).

Appendix C

In Count IV, Brown seeks a declaratory judgment that her substantive due process rights were violated in Case No. 1 because: (1) the Florida Supreme Court's decision was wrongly decided; (2) she never had notice or opportunity to present at trial or on appeal the claims she made in her Motion for Rehearing or arguments related to the vagueness of the Rule or the court decision, the harshness of the penalty, or the motives of the government agents; and (3) the Suspension Order amounts to an *ex post facto* law by the Florida Supreme Court. (Doc. #33, ¶¶ 148-60.)

"The *Rooker-Feldman* doctrine[2] makes clear that federal district courts cannot review state court final judgments because that task is reserved for state appellate courts or, as a last resort, the United States Supreme Court." *Casale v. Tillman*, 558 F.3d 1258, 1260 (11th Cir. 2009). This is a narrow doctrine, confined to "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Lance v. Dennis*, 126 S. Ct. 1198, 1201 (2006) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)). The Eleventh Circuit has focused on this language as delineating the boundaries of the *Rooker-Feldman* doctrine. *Green*, 563 F.3d at 1249-50; *Nicholson v. Shafe*, 558 F.3d 1266, 1274 (11th Cir. 2009).

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2. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

The Court finds that it lacks subject-matter jurisdiction to address Count III and Count IV of the Amended Complaint under the *Rooker-Feldman* doctrine. Brown filed this federal case after the Florida Supreme Court rendered its decision as to her disciplinary proceeding; Brown lost the case before the Florida Supreme Court; Brown's requests for declaratory judgments complain of injuries caused by the Florida Supreme Court's decision; and Brown invites this court to review and reject the judgment of the Florida Supreme Court. As in *Feldman*, Brown seeks to have a federal district court review and reject the judgment of the highest state court as to its application of bar rules and regulations to her conduct. A district court has no such authority. *Feldman*, 460 U.S. at 486. Plaintiff's proper recourse to challenge the decision of the Florida Supreme Court was to file a writ of certiorari with the United Supreme Court. *Fox v. Florida*, 138 Fed. Appx. 194 (11th Cir. 2005).

E. Count V: Eleventh Amendment Immunity of The Florida Bar

In Count V, Brown seeks a declaratory judgment that the Eleventh Amendment does not immunize The Florida Bar from a suit for money damages in federal court. (Doc. #33, ¶¶ 167-72.)

Count V is due to be dismissed for several reasons. First, there is no case or controversy in this case regarding that issue. Brown does not seek money damages in any count in the current federal case (although she alleges in paragraph 164 of the Amended Complaint that she

suffered money damages). Therefore, the answer to this question would merely be an advisory opinion.

Second, Brown is simply seeking to collaterally attack the prior holding of the Eleventh Circuit to the contrary. The issue was raised and rejected in *Brown v. Fla. Bar*, 243 Fed. Appx. 552 (11th Cir. 2007). The proper method to challenge that decision was a request for rehearing en banc or a petition for certiorari with the United States Supreme Court. *Fox v. Florida*, 138 Fed. Appx. 194.

Third, even if the issue can be properly raised in this case, the binding precedent precludes Brown from prevailing. Dismissal is warranted under FED. R. CIV. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1009-10 (11th Cir. 1992). It is clearly established that The Florida Bar is entitled to Eleventh Amendment immunity in suits for money damages. *Kaimowitz v. Fla. Bar*, 996 F.2d 1151 (11th Cir. 1993); *Brown v. Fla. Bar*, 243 Fed. Appx. 552 (11th Cir. 2007). Therefore, Count V will be dismissed.

F. Count VI: Compelled Bar Membership

In Count VI, Brown seeks a declaratory judgment that The Florida Bar is unconstitutionally constituted in violation of the Florida separation of powers doctrine; amounts to an impermissible closed shop in a right-to-work state such as Florida; and that Brown is not required

to maintain her membership in The Florida Bar as a condition of working as a licensed attorney in Florida. (Doc. #33, pp. 32-35.) Brown argues that The Florida Bar is unconstitutional *ab initio* and that the Florida Constitution prohibits mandatory membership fees in what is essentially a labor organization. (Doc. #45, pp. 1-2, 8-9.) Brown also asserts an equal protection/due process component to her claim.

In Count VI, Brown makes a facial challenge to the constitutionality of The Florida Bar and the Rules Regulating the Florida Bar. The Court agrees with Brown's observation that this count really does not turn on her disciplinary proceedings. (Doc. #45, p. 17.) A federal district court has subject matter jurisdiction of general challenges to the bar rules and procedures promulgated by state courts in non-judicial proceedings which do not require review of a final state court judgment in a particular case. *Feldman*, 460 U.S. at 486; *Kirkpatrick v. Shaw*, 70 F.3d 100, 102 (11th Cir. 1995); *Corbin v. Supreme Court of Fla.*, 233 Fed. Appx. 917 (11th Cir. 2007). Therefore, Count VI is not barred by the *Rooker-Feldman* doctrine.

Because plaintiff may be able to state a federal declaratory judgment claim in Count VI, and a district court would have jurisdiction to consider such a claim, a second amended complaint will be required. As currently written, the Amended Complaint is a shotgun complaint prohibited by the Eleventh Circuit because plaintiff has improperly incorporated all allegations of each count in every successive count. *Magluta v. Samples*, 256 F.3d

1282, 1284 (11th Cir. 2001); *Cramer v. Florida*, 117 F.3d 1258, 1263 (11th Cir. 1997). Additionally, Count VI is currently encumbered with immaterial and irrelevant allegations regarding plaintiff's personal disciplinary proceedings. Therefore, the Court will dismiss Count VI without prejudice and with leave to file a second amended complaint.

Accordingly, it is now

ORDERED:

1. Defendants Raoul G. Cantero, Kenneth B. Bell, R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince and the Supreme Court of Florida's Motion to Dismiss (Doc. #13) is **GRANTED IN PART AND DENIED IN PART.** Defendants Raoul G. Cantero, Kenneth B. Bell, R. Fred Lewis, Charles T. Wells, Harry Lee Anstead, Barbara J. Pariente, Peggy A. Quince are dismissed from all counts of the Amended Complaint; the Supreme Court of Florida is dismissed from all counts of the Amended Complaint, but plaintiff is granted leave to file a second amended complaint within **TWENTY (20) DAYS** of the date of this Opinion and Order setting forth her federal claim in what is currently Count VI.

2. The Florida Bar's Motion to Dismiss (Doc. #14) is **GRANTED IN PART AND DENIED IN PART.** The Florida Bar is dismissed from all counts of the Amended Complaint, but plaintiff is granted leave to file a second amended complaint within **TWENTY (20) DAYS** of the

date of this Opinion and Order setting forth her federal claim in what is currently Count VI.

DONE AND ORDERED at Fort Myers, Florida, this 29th day of May, 2009.

/s/
JOHN E. STEELE
United States District Judge